No. 7765

United States Circuit Court of Appeals

For the Ninth Circuit

MARGARET B. BARRINGER and PHOENIX TITLE and TRUST COMPANY, as Trustee,

Appellants

vs.

GEORGE E. LILLEY, as Trustee in Bankruptcy of the Estate of Windsor Square Development, Inc., a corporation, bankrupt, SALT RIVER VALLEY WATER USERS' ASSOCIATION, a corporation, CENTRAL ARIZONA LIGHT and POWER COMPANY, a corporation, COUNTY OF MARICOPA, a political subdivision of the State of Arizona, STATE OF ARIZONA, JOHN D. CALHOUN, County Treasurer of the County of Maricopa, State of Arizona, MITT SIMS, Treasurer of the State of Arizona, W. R. WELLS, RAYMOND L. NIER, J. ALLEN WELLS, E. L. GROSE and MAUDE M. GROSE, his wife, GLEN E. WEAVER, LUCILLE NICHOLS, NELLIE B. WILKINSON, SUSIE M. WALLACE, E. R. FOUTZ, THOMAS J. TUNNEY and WINDSOR SQUARE DEVELOPMENT, INC., the bankrupt corporation,

Appellees.

Reply Brief of Margaret B. Barringer and Phoenix Title & Trust Company

Brief and Argument on Appellees' Motions to Dismiss or Affirm and to Strike Statement of Evidence

Answers of Margaret B. Barringer and Phoenix Title & Trust Company to Motions of Appellees George E. Lilley, Trustee in Bankruptcy, E. L. Grose and Central Arizona Light & Power Company to Dismiss or Affirm and to Strike Statement of Evidence

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WM. H. MACKAY,
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Of Counsel

THE MANUFACTURING STATIONERS INC., PHOENIX, ARIZONA

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Reply Brief of Appellants Margaret B. Barringer and Phoenix Title & Trust Company

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TRUSTEE'S CONTENTIONS CONCERNING EFFECT OF RECORDING ACT

Trustee's argument seems to be as follows:

(1) Equitable title was in Owens, Dinmore and Mills for the following reasons:

(a) Declaration of trust placed beneficial ownership in their assignor.

(b) As vendees under contract they had equitable title.

(c) A resulting trust arose in their favor.

(2) Owens, Dinmore and Mills, under the declaration of trust, gave Barringer an equitable mortgage on their equitable interest, which mortgage is void because not recorded.

Declaration of trust vested no interest in bankrupt's assignors.

All premises in trustee's argument are false. At pages 36 and 37 of their brief trustee's counsel state appellants admitted equitable ownership was vested in Owens, Dinmore and Mills. They refer to the recital in the declaration of trust that sole beneficial interest *under the trust* is vested in Tunney (433-434) and ignore the express stipulation that the beneficiary and his assignees shall never have any interest *in the trust property,* that his benficial interest under the trust is personalty, and that his sole right shall be to demand performance (433-444). Trustee's counsel ignore the intent of the agreement, namely, to vest Trust Company with title so complete that it may pass perfect title to lot purchasers.

Bankrupt's assignors got no interest as vendees under option contained in declaration of trust.

Owens, Dinmore and Mills were not vendees according to the terms of the trust agreement. Under section twenty-one they had an option to buy all unsold lots from Trust Company on paying all sums due Barringer (450). In *Strahan vs. Haynes* (1928), 33 Ariz. 128, 262 Pac. 995 (cited appellee's brief, pages 16, 41), there was a *contract* to purchase and the vendee had tendered the full purchase price. Plaintiff sued for specific performance and the court held that a decree of specific performance is not a

forced sale. This decision in no way conflicts with the settled rule in Arizona that a vendee (not to mention a mere optionee) who has not fully performed has no interest in real estate subject to execution. For the court's convenience the Arizona cases so holding are again cited.

Costello vs. Friedman (Ariz. 1903), 71 Pac. 935, 937;

Bennett vs. U. S. Land etc. Co. (Ariz. 1914), 141 Pac. 717, 720, 721;

Snow vs. Kennedy (Ariz. 1930), 286 Pac. 930, 932, 933.

No resulting trust in bankrupt's assignors.

Cases cited by trustee's counsel are not in point (appellee's brief pages 39-42). In *Smithsonian Institute vs. Meech* (1897), 169 U. S. 397, 42 L. Ed. 793, the Supreme Court declared:

> "The existence of an express agreement does not destroy the resulting trust. It was not an agreement made by one owning and having the legal title to real estate by which an express trust was attempted to be created, but it was an agreement prior to the vesting of title—an agreement which became a part of and controlled the conveyance; and evidence of its terms is offered, *not for the purpose of establishing an express trust, but of nullifying the presumption of an advancement* and to indicate the disposition which the real owner intended should be made of the property." (Italics ours.)

In the instant case the vendor, the vendee, and the alleged *cestui que* expressly agreed no trust could result.

Furthermore, even if an equitable interest did vest in Tunney and his assignees, the recording act does not apply to interests that do not appear of record. The decisions in Arizona and in Texas, whence the recording act came, are set forth at pages 23-25 of appellants' opening brief.

At page 51 of their brief trustee's counsel argue that Tunney was named as beneficiary for the purpose of concealing the true title from creditors. Title of record in Trust Company apprised all persons that it was in Trust Company and not elsewhere.

Appellee's contentions re estoppel.

Estoppel cannot be predicated on Grose's testimony. His dealings, from down-payment to execution of contracts to purchase, were evidenced by writings identifying Trust Company as owner. He believed Owens owned the tract because Owens said so and he read none of the receipts or contracts in his own possession (see appellants' opening brief pages 27-29).

Leiber did not inquire concerning ownership. He inquired concerning the *credit* of Owens, Dinmore and Mills as seems conceded at page 56 of appellee's brief. Incidentally, their financial ability may be very good at the present time. They did not take bankruptcy.

Appellants objected to all evidence of estoppel because not pleaded after Grose's testimony but before Leiber's (633) and renewed the objection at the outset of Leiber's testimony (638).

Trustee's further contentions on merit.

Inasmuch as appellants contend that title is in Trust Company and do not contend that Barringer has a resulting trust or vendor's lien, it is unnecessary to reply to the following contentions of trustee's counsel: (g) that Barringer cannot claim title or resulting trust (page 15, appellee's brief); (k) that Barringer cannot claim a vendor's lien (page 16, appellee's brief); (o) Barringer, having claimed lien, cannot claim title (page 18, appellee's brief); (p) that if Barringer's deed to Trust Company was intended as a mortgage, it is void because not recorded as such (page 18, appellee's brief).

Appellee contends that Barringer's conveyance to Trust Company is fraudulent because they knew the bankrupt corporation was about to create debts (page 51, appellee's brief). The conveyance was delivered in January, 1929. The bankrupt was not even organized until June, 1930.

Assignments of error are sufficient.

Error in the district court's order was uniformly assigned. To be specific it was necessary to refer to the order in terms of the referee's decree which merely affirmed. Basis for assignment of error XVII was laid on review (270-271). Jurisdiction may be attacked without assignment.

> *San Francisco vs. McLaughlin* (9 C.C.A. 1925), 9 Fed. (2) 390.

In assignments XIV and XV it is averred the district court erred in affirming the referee's findings that appel-

lants held bankrupt and its predecessors out as owners, respectively. In each of these assignments it is averred that such finding was "without support in the evidence before the referee", which fairly identifies the evidence on review because the district court heard no evidence *de novo*. Furthermore, in these two assignments it is alleged that each finding "is contrary to the evidence" (119-120; 814-815). In assignment IV it is affirmatively averred that the district court erred in its order approving the referee's decree "in that said referee erroneously found from the evidence that Barringer sold the property to Owens, Dinmore & Mills". The balance of said assignment avers that the evidence shows Barringer conveyed by recorded deed to Trust Company which, with bankrupt's assignor, agreed to hold property as security for debt (115; 810). The words "as shown by said reporter's transcript" are purely explanatory and not restrictive. Assignment V avers error in holding Trust Company's title and Barringer's lien extinguished because the declaration of trust was not recorded. If this erroneous conclusion of law is not involved in the order, why does trustee's counsel devote 29 pages of his written argument in endeavoring to support it? It is submitted that all assignments of error comply with rule 11 of this court.

The order appealed from was based on the conclusion that Trust Company's record title and Barringer's rights were extinguished because the declaration of trust was not recorded and the finding that appellants held Owens, Dinmore and Mills and the bankrupt out as owners. The conclusion is supported by no authorities. There is no evidence to support the finding. Such plain error should

be considered, even if assignments were irregular, to avoid miscarriage of justice.

Pierce vs. United States (1920), 255 U. S. 398, 65 L. Ed. 697;

Mahler vs. Eby (1923), 264 U. S. 32, 68 L. Ed. 549.

Time will not permit briefing all appellee's contentions.

Respectfully submitted,

ELLINWOOD & ROSS,

.....

WM. H. MACKAY,

KIBBEY, BENNETT, GUST, SMITH & ROSENFELD,

.....

JOHN L. GUST,

Solicitors for Margaret B. Barringer and Phoenix Title & Trust Company.

Appellants' Brief and Argument on Appellees' Motions to Dismiss or Affirm and to Strike Statement of Evidence

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Appellees Lilley, Groses, and Central Arizona Light & Power Company, separately moved to dismiss or affirm on one or more of the following alleged grounds:

(1) Defect parties on review.

(2) Defect parties on appeal.

(3) Appeal not taken in thirty days.

(4) Statement evidence not settled per equity rule 75.

The following facts are relevant to the questions raised on these motions. References by numerals are to printed transcript of the record.

Parties affected by the order appealed from.

The order (in terms of referee's decree) as to appellees Calhoun, Sims, State and County, affirmed the lien of the State and County (239). This portion of the decree was entered pursuant to stipulation of all counsel (ref. sum. 302). Likewise, pursuant to stipulation (ref. sum. 302) the lien of Salt River Valley Water Users Association for irrigation district assessments was confirmed (239-240). Pursuant to its own stipulation with bankrupt's trustee (234) Central Arizona Light & Power Company was adjudged to have an easement for poles and wires (240-241), which easement was granted to it by Trust Company on subdividing the tract (234-235). It was adjudged that the following named appellees held unforfeited contracts to purchase the respective lots mentioned opposite their names (234-246):

W. R. Wells, Lot 2, Block 1;

Raymond L. Nier, Lot 16, Block 1;

J. Allen Wells, Lot 22, Block 3;

Glen E. Weaver, Lot 24, Block 4;

E. R. Foutz, Lots 15 and 26, Block 7;

Lucille Nichols, Lot 17, Block 7;
Nellie B. Wilkinson, Lots 23 and 25, Block 7;
Susie M. Wallace, Lot 9, Block 8, ———

and the trustee was directed to sell these lots subject to their rights under their respective sales contracts (246). Trust Company was the vendor in each of their contracts. Appellants have never challenged the rights of any appellee under the decree, save those of Groses and the trustee in bankruptcy. In the decree the referee found that Groses have fully paid for lots 1 and 2, block 4, and directed the trustee to convey the same to them (250). Grose answered under oath, alleging that he purchased two lots under written contracts executed by Trust Company as sole vendor; that he executed such contracts relying on an earlier oral promise of Owens that purchase prices would be rebated if said paving was not installed (224-231). Over objections (545-547) Grose was permitted to testify as to the oral promises, but did not show agency as alleged and swore that he thought he was buying the lots from Owens, not having read his written contracts (545-546; 560).

There was no defect parties on review.

District Court rule 61 required the referee on transmitting his certificates to notify all parties interested (see appendix). The referee transmitted his certificates on November 18, 1932 (161). They were filed on the same date, which was Friday (160). The petitions for review were automatically set and noticed for hearing on the regular law and motion calendar for the second Monday fol-

lowing (see appendix). They came up regularly on that date, namely, November 28, 1932 (376-377). Parties then failing to appear could not complain of lack of notice at subsequent hearings. But the minutes show further hearing was order set for August 9, 1934 "pursuant to the consent of the parties" (411-412).

The jurisdiction to review is created by statute, 11 U. S. C. A. 11 (10), and is so inherent District Courts may review *sua sponte*.

> *In re de Ran* (6 C.C.A. 1919), 260 Fed. 732, 739, 740.

Furthermore, appellants took all steps required by General Order 27 and District Court rule 61. Nothing further was required of them.

> *In re L. & R. Wister Co.* (3 C.C.A. 1916), 237 Fed. 793, 795;
>
> *In re David* (3 C.C.A. 1929), 33 Fed. (2d) 748;
>
> 8 *Remington* (4th ed.), Secs. 3654-3659;
>
> *Gilbert's Collier* (2d ed.), 672.

Furthermore, trustee and Groses appeared at the hearing and neither claimed lack of notice (412). Appellants sought no review as to the rights of other appellees (259-274; 353-374).

There was no defect parties on appeal.

Each and every appellee was served with District Court citation, petition, assignments of error, bond and order allowing appeal, except J. Allen Wells (800-805) who had

no counsel of record and who was not within the district (805). The order (in terms of the referee's decree) merely recognized his contract to purchase lot 22, block 3, which Trust Company gave him and which appellants recognized. If the marshal's inability to find J. Allen Wells does not excuse appellants from serving citation, it should be noted that he was not a necessary party to an appeal. The decree did not run against appellants and him jointly. His interest was not adverse to appellants. If the order is reversed he still has the contract which the order recognized. Under such circumstances, neither Groses, Weaver nor any other lot purchasers whose rights under the order are not attacked on appeal, is a necessary party.

Kochititzky vs. Merc. Trust Co. (8 C.C.A. 1926), 16 Fed. (2) 227;

Mathis vs. Hemingway (8 C.C.A. 1928), 24 Fed. (2) 951, 954;

Osage Oil & Ref. Co. vs. Mulber Oil Co. (10 C.C.A. 1930), 38 Fed. (2) 396, 397, 398.

Appeal was taken within thirty days.

On December 13, 1934, the District Court affirmed the referee's decree (412). Four days later it vacated this order "for the purpose of allowing Respondents Margaret B. Barringer and Phoenix Title & Trust Company to file further authorities" (413). On January 7, 1935, the District Court entered its further order, reciting that the petitions had been resubmitted upon additional authorities and that the court had duly considered them (414).

Bankruptcy courts have *jurisdiction* to vacate their orders at least until expiration of time for appeal. Discretion to vacate is not abused unless the purpose be to revive or extend the time for appeal.

West vs. W. A. McLaughlin & Co's. Trustee (6 C.C.A. 1908), 162 Fed. 124, 126;

In re Rubin (7 C.C.A. 1924), 1 Fed. (2) 157;

cf. *Bonner vs. Potterf* (10 C.C.A. 1931), 47 Fed. (2) 852, 855;

cf. *Mutual Bldg. & Loan Assn. vs. King* (9 C.C.A. 1936), 83 Fed. (2) 798.

Orders of a bankrupcy court do not become final until time for appeal has expired.

In re Fox West Coast Theatres (9 C.C.A. 1937), 88 Fed. (2) 212, 221.

Appellees cite *In re L. H. Seifer & Sons, Inc.* (7 C.C.A. 1935), 78 Fed. (2) 196, where the order was vacated on the 30th day and immediately re-entered, with no apparent reason other than to revive or extend time for appeal. Councel cite the same decision as holding a petition for re-hearing essential to a valid vacation. Undoubtedly, to vacate an order after time for appeal has expired requires a petition filed before such expiration. But, no case can be found where vacation *sua sponte* before expiration for *bona fide* reconsideration was held void. Even as to cases falling within section 57 (k) of the bankruptcy act, 11 U. S. C. A. 93 (k), a referee (hence, a District Court) may vacate *sua sponte*.

McCallum vs. Stem (6 C.C.A. 1924), 23 Fed. (2) 491, 492.

Statement of evidence was duly settled.

Motions to dismiss for alleged lack of statement of evidence should be denied, for appeals may be heard without the evidence.

> *Harris vs. Moreland Motor Truck Co.* (9 C.C.A. 1922), 279 Fed. 542.

The facts, relevant to motions to strike are as follows:

Contents statement.

It includes all papers of all evidentiary matter certified by the referee. Omitted matters according to trustee's counsel are: (1) stipulation that referee should not enter order (reviewable in 10 days) while appellants' counsel was on vacation; (2) petition, schedules and amended schedules (Lilley's motion to strike, pages 7 and 8). The stipulation, obviously, is not evidentiary. The petition, schedules and amended schedules are in the statement (petition, 569; schedules, 570-571; amended schedules, 619-622). Condensation of exhibits is proper.

> *Fiorito vs. Clyde Eqt. Co.* (9 C.C.A. 1925), 2 Fed. (2) 807;
>
> *Hughes vs. Reed* (10 C.C.A. 1931), 46 Fed. (2) 435, 438.

The statement of evidence as settled included the adoption *verbatim* of proposed amendments 1 (416-418), 2 (422), 3 (452-454), 4 (465), 5 (466-469), 6 (471-473), 7 (478-480), 8 (481-489), 9 (494-496), 10 (500-505), 11 (531-535), 12 (605-613), 17 (671-672), 18 (672-673), 19

(675), 20 (675-677), 21 (677-678), 22 (422), 23 (441), 24 (455), 25 (571-572), 26 (573-574), 27 (587-591), 28 (592-604), and 29 (616-618). The greater part of amendment 16 (758-765) was likewise adopted. Amendments 13, 14, 15 and part of 16 were rejected for the obvious reason that they delete all objections and exceptions made and saved by appellants (743-744, 744-753, 753-758, 766-773). As to rejected amendments the court inserted testimony *verbatim* (682).

Notice of settlement.

Appellants served and lodged their proposed statement (680) which, the order of settlement recites, was duly presented. This finding is not impeachable.

> *Edwards vs. Holland Banking Co.* (8 C.C.A. 1935) 75 Fed. (2) 713, 715.

Furthermore, trustee's counsel confess due notice of hearing for approval (687) and due continuance of hearing until May 25, 1936 (688). On that date appellants and trustee appeared in open court and the court, Hon. Judge F. C. Jacobs sitting, recited in its minutes that "this cause comes on regularly for approval of Statement of Evidence * * *" (691). While the trustee was given additional time to file objections and proposed amendments, no order continuing the hearing for approval was entered (691-692). The lodged statement was in open court in the clerk's custody and physical presentation by counsel was impossible. The fair implication from the minutes for May 25, 1936, is that appellants presented the statement and trustee was given further time to *file* objections and amend-

ments. The order did not continue hearing for settlement to August 1, 1936, as contended by counsel. It kept the time for entry of order of settlement open to that date (691). Court adjourned in June, returned in the fall, and (Hon. Dave W. Ling then sitting) examined the proposed amendments and asked appellants' counsel what amendments could be agreed upon. On getting this advice he examined and inserted the testimony *verbatim* as to the few amendments which appellants' counsel felt unable to concede. Such procedure was regular.

Equity Rule 75;

Selway vs. Fourth Natl. Bank (6 C.C.A. 1922), 283 Fed. 783, 784.

Appellants concede the statement is not as compact as they wished it to be. A highly condensed statement was presented to trustee's counsel in May, 1935, and returned by them in November of that year with 83 pages of suggested changes, requiring most exhibits *verbatim* and much testimony rewritten. With slight changes these suggestions were incorporated into the statement as lodged.

Settlement by the court.

No evidence was heard *de novo* on review (411, 412; 681).

Settlement of statement (unlike bill of exceptions) is not jurisdictional but ministerial.

Struett vs. Hill (9 C.C.A. 1920), 269 Fed. 247, 249;

Century Bldg. & Loan Assn. vs. Wickersham (5 C.C.A. 1935), 75 Fed. (2) 812, 813;

In re Equity Rule 75 (6 C.C.A. 1914), 222 Fed. 884, 885.

Equity Rule 75 expressly provides for presentation to and settlement by the court or judge. Decisions recognize the alternative avenues.

In re Equity Rule 75 (6 C.C.A. 1914), 222 Fed. 884;

Edwards vs. Holland Banking Co. (8 C.C.A. 1935), 75 Fed. (2) 713, 715;

Struett vs. Hill (9 C.C.A. 1920), 269 Fed. 247, 249.

In the leading case *Barber Asphalt Co. vs. Standard etc. Co.* (1927), 275 U. S. 372, 72 L. Ed. 318, the record on review was highly incapable of identification as compared to the instant one. Yet, the Supreme Court at page 385 (L. Ed. 325-326) declared:

> "The third matter is that by reason of the death of Judge Humphrey who presided at the interlocutory hearing, the master's failure to attach a certificate to the evidence taken before him and the clerk's failure to place a filing endorsement thereon the usual and favored means of identifying the evidence are not available. We think what is said in the forepart of this opinion shows that other adequate means of identification are at hand. The district court experienced no difficulty in this regard when it made the order of approval under the first remission."

Equity Rule 75 literally permits settlement by "court or judge". Unless its clear terms be ignored this includes the court as constituted with its presiding judge sitting.

Cases cited by appellees involve evidence authenticated merely by clerks and court reporters.

Gault vs. Trust Company.

In *Gault vs. Trust Company* (5 C.C.A. 1934), 69 Fed. (2) 133, appellant sought to bring the evidence up by means of a transcript of testimony authenticated by a court reporter. This obviously was not a statement settled by "court or judge" as required by Equity Rule 75 and the court might well have rested its decision on that ground alone. The court pointed out that under Equity Rule 46 there is no official reporter in a federal equity court, it being the duty of the judge to report or state objections, rulings and exceptions when testimony is taken in open court.

On review, unless testimony be adduced *de novo* in the hearing of the district court, it hears no testimony. It reads it. If the reviewing judge himself authenticated the evidence or even the referee's summary he would, under appellee's theory of *Gault vs. Trust Company*, be without authority because he did not actually hear the testimony. Reasonably applied to cases on review, Equity Rule 46 requires the evidence on review to be authenticated by the referee or master who heard it. It was so authenticated in the instant case, the referee certifying the reporter's transcript as part of the record on review (160) when his summary was found inaccurate (412). The testimony was reported and transcribed pursuant to the referee's order and appointment (415-417) as well as stipulation (416-417). It should be noted that Equity Rule 50 authorizes

the court to appoint a stenographer to take down and transcribe testimony.

Where there are several judges it will be presumed that any judge acted by agreement with his associates.

Case vs. United States (8 C.C.A. 1926), 14 Fed. (2) 510, 512.

If the court be of the opinion that settlement alone may be had by the judge who reviewed the written record on review, the statement should be returned for settlement by such judge (see Exhibit A).

Respectfully submitted,

ELLINWOOD & ROSS,

.....

WM. H. MACKAY,

KIBBEY, BENNETT, GUST, SMITH & ROSENFELD,

.....

JOHN L. GUST,

Solicitors for Margaret B. Barringer and Phoenix Title & Trust Company.

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UNITED STATES CIRCUIT COURT OF APPEALS

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Appellants,

vs.

GEORGE E. LILLEY, as Trustee in Bankruptcy of the Estate of Windsor Square Development, Inc., *et al,*

Appellees.

Answer of Appellants Margaret B. Barringer and Phoenix Title & Trust Company to Motion of Appellee George E. Lilley, Trustee in Bankruptcy, to Dismiss or Affirm.

COME NOW Margaret B. Barringer and Phoenix Title & Trust Company and, answering the aforesaid motion to to dismiss or affirm, upon the record in said cause and the affadavit marked "Exhibit A" hereto annexed, respectfully show to the court as follows:

The appeal was taken in the time allowed by law; the order of December 13, 1934, was duly vacated and the order of January 7, 1935, was not void for want of jurisdiction (save and except for fraud); any and all rights of George E. Lilley, as Trustee in Bankruptcy of the Estate of Windsor Square Development, Inc., which were recognized in said vacated order, were to the same extent recognized in the order appealed from; J. Allen Wells and Glen E. Weaver are not necessary parties to the appeal in that the order appealed from merely recognizes their existing contracts to purchase two lots from Phoenix Title & Trust Company; if said decree be reversed their respective rights under said contracts are in no way affected; citation issued by district court was served on all appellees except J. Allen Wells, who was not within the district, as shown by the marshal's return; neither J. Allen Wells nor Glen E. Weaver could be found for service of citation from this Court as shown by marshal's return which as to Weaver has been omitted through inadvertance (see Exhibit A); præcipe for transcript of record was served on all appellees who had counsel of record; statement of evidence was settled in accordance with Equity Rule 75 and appellee, George E. Lilley, as Trustee in Bankruptcy, had notice of settlement and was heard; petitions for review were filed and heard on notice in strict accordance with General Order 27 and Rules of Practice of the United States District Court for the District of Arizona.

WHEREFORE, said appellants pray that the aforesaid motion to dismiss or affirm be denied.

Respectfully submitted,

ELLINWOOD & ROSS,

.....

WM. H. MACKAY,

KIBBEY, BENNETT, GUST, SMITH & ROSENFELD,

.....

JOHN L. GUST,

Solicitors for Margaret B. Barringer and Phoenix Title & Trust Company.

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MARGARET B. BARRINGER and PHOENIX TITLE & TRUST COMPANY, as Trustee,

Appellants,

vs.

GEORGE E. LILLEY, as Trustee in Bankruptcy of the Estate of Windsor Square Development, Inc., *et al,*

Appellees.

Answer of Appellants Margaret B. Barringer and Phoenix Title & Trust Company to Motion of Appellee E. L. Grose to Dismiss or Affirm.

COME NOW Margaret B. Barringer and Phoenix Title & Trust Company and, answering the aforesaid motions to dismiss or affirm, upon the record in said cause, respectfully show to the court as follows:

The order entered by the district court on December 13, 1934, was duly vacated and the court had jurisdiction (save and except for fraud) to enter the order appealed from; any and all rights of E. L. Grose which were recognized in said vacated order were to the same extent recognized in the order appealed from; appeals were taken within thirty days thereafter; E. L. Grose received due notice of lodging and presentation of proposed statement of evidence and failed to appear at the hearing thereof.

WHEREFORE, appellants pray that said motions to dismiss or affirm be denied.

Respectfully submitted,

ELLINWOOD & ROSS,

.....

WM. H. MACKAY,
KIBBEY, BENNETT, GUST,
SMITH & ROSENFELD,

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JOHN L. GUST,
Solicitors for Margaret B. Barringer and Phoenix Title & Trust Company.

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Appellants,

vs.

GEORGE E. LILLEY, as Trustee in Bankruptcy of the Estate of Windsor Square Development, Inc., *et al*,

Appellees.

Answer to Appellants Margaret B. Barringer and Phoenix Title & Trust Company to Motion of Central Arizona Light & Power Company to Dismiss or Affirm.

COME NOW Margaret B. Barringer and Phoenix Title & Trust Company and, answering the aforesaid motion to dismiss or affirm, upon the record in said cause, respectfully show to the court as follows:

Their petitions for review were filed and heard by the United States District Court for the District of Arizona on notice to Central Arizona Light & Power Company in strict accordance with the requirements of General Order 27 and the rules of practice of said district court; the district court denied petitioner's motion to strike the referee's summary of the evidence and Central Arizona Light & Power Company was in no way prejudiced by alleged

lack of notice of said motion; the district court duly vacated its order of December 14, 1934, and had jurisdiction (save and except for fraud) to enter the order appealed from; no rights of Central Arizona Light & Power Company under the earlier order were disturbed under the order of January 7, 1935; the vacated order and the order appealed from, respectively, affirmed in Central Arizona Light & Power Company an easement or easements granted to it by Phoenix Title & Trust Company, which easements neither of appellants contest; statement of evidence was settled on due notice to Central Arizona Light & Power Company in strict accordance with Equity Rule 75.

WHEREFORE, said appellants pray that the aforesaid motion to dismiss or affirm be denied.

Respectfully submitted,

ELLINWOOD & ROSS,

.....

WM. H. MACKAY,

KIBBEY, BENNETT, GUST,
SMITH & ROSENFELD,

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Appellees.

Answer of Margaret B. Barringer and Phoenix Title & Trust Company to Motions of George E. Lilley, as Trustee in Bankruptcy, E. L. Grose and Central Arizona Light & Power Company to Strike the Statement of Evidence.

COME NOW Margaret B. Barringer and Phoenix Title & Trust Company and, answering the aforesaid motions, upon the record in said cause, and upon the affidavit hereunto annexed and marked "Exhibit A" respectfully show to the court as follows:

Said statement is a true and complete statement of the evidence adduced before the referee in bankruptcy and

reviewed by the United States District Court for the District of Arizona, each respectively, and is a condensed statement in narrative form of the evidence and testimony of witnesses essential to the decision of the questions presented by the appeal and that all papers of an evidentiary character are included therein; exhibits and oral testimony are set out in said statements *verbatim* only where the parties failed to agree; said statement was settled in strict accordance with Equity Rule 75 upon notice; in said appeals appellants do not challenge the rights of any party to said cause under the order appealed from other than those of George E. Lilley, as Trustee in Bankruptcy, and said Groses; hearing for settlement was duly had by said district court and appellee George E. Lilley, as Trustee in Bankruptcy, was given an extention of time within which to file objections and proposed amendments; said district court carefully examined said objections and proposed amendments when filed, ascertained that all of said twenty-nine proposed amendments, except four or five of them, were deemed satisfactory by appellants counsel and said district court in settling said statement substituted the said proposed amendments which were agreeable to counsel and inserted testimony *verbatim* in those portions where counsel could not agree; Honorable Dave W. Ling, presiding Judge of the United States District Court at Phoenix, had jurisdiction to settle, allow and approve said statement of evidence; said statement contains all the evidence and proceedings certified by the referee and all of the evidence and proceedings reviewed by the district court.

WHEREFORE, said appellants pray that the aforesaid motions to strike the statement of evidence be denied.

Respectfully submitted,

ELLINWOOD & ROSS,

.....

WM. H. MACKAY,

KIBBEY, BENNETT, GUST,
SMITH & ROSENFELD,

.....

JOHN L. GUST,

Solicitors for Margaret B. Barringer and Phoenix Title & Trust Company.

EXHIBIT A.

AFFIDAVIT

STATE OF ARIZONA,)
)ss.
COUNTY OF MARICOPA)

WM. H. MACKAY, beng first duly sworn, upon oath deposes and says:

That he is one of the counsel for Margaret B. Barringer and Phoenix Title & Trust Company in the above entitled cause; that on July 27, 1932, he requested a stipulation from counsel for George E. Lilley, Trustee in Bankruptcy, to the effect that the referee should not enter any order in cause No. B-570 in bankruptcy, for the reason that review of said order is by the rules of the United States District Court for the District of Arizona to be had only within ten days; that affiant was shortly leaving on his vacation and feared that his clients' interests would not be protected if, during his absence, they were required to file their petitions for review; that said stipulation was not specified in any of the præcipes filed by any parties in said cause.

That on November 12, 1935, affiant delivered to the United States Marshal at Phoenix citation issued by the Circuit Court of the United States for the Ninth Circuit, together with the following letter:

"

November 12th, 1935

United States Marshal,
Phoenix, Arizona.

re: Margaret B. Barringer, et al, vs. George E. Lilley, as Trustee in Bankruptcy of the Estate of Windsor Square Development, Inc.—United States Circuit Court of Appeals—No. 7765.

Dear Sir:

Enclosed herewith please find original Citation signed by Curtis D. Wilbur, Judge of the United States Circuit Court of Appeals for the Ninth Circuit, on October 21, 1935. We have obtained acknowledgments of service from all of the appellees named in said cause with the exception of the following:

J. Allen Wells,
Glen E. Weaver,
John D. Calhoun.

We believe that Mr. Weaver, who formerly lived at the Arizona Club, is no longer in the state. The other two persons we believe reside in Phoenix, but we do not have their address. We shall appreciate your early effort to obtain service on the three persons above mentioned.

Very truly yours,

ELLINWOOD & ROSS

WHM:RM
Enc."

That on November 20, 1935, said United States Marshal returned said citation to the clerk of this court with the following letter signed by his deputy:

"Tucson, Arizona, Nov. 20, 1935.

Hon. Paul T. O'Brien,
Clerk, U. S. Circuit Court of Appeals,
9th District,
San Francisco, Calif.

Sir:

There is transmitted herewith Citation in the matter of Windsor Square Development, Inc., a corporation, Bankrupt, George E. Lilley, as Trustee in Bankruptcy of the Estate of Windsor Square Development, Inc., a corporation, Bankrupt, vs. Margaret B. Barringer, et al., with endorsement made thereon by all parties with the exception of J. Allen Wells and Glen E. Weaver, for filing.

This office is unable to locate these parties within the district.

Respectfully yours,

HWS-FSW
cc to Ellinwood & Ross
Attorneys,
Phoenix, Arizona.

B. J. McKinney,
United States Marshal,
By
Chief Deputy."

That through inadvertance the return of said marshal, showing that he was unable to find appellee Glen E. Weaver, has been omitted from the record.

That from May to and including November, 1935, affiant consulted with counsel for trustee in bankruptcy as to the form of statement of evidence and in June of that year prepared and submitted to said counsel a com-

plete statement which was highly condensed and in narrative form; that at said time there was no judge at Phoenix; that said counsel did not return said proposed statement until November 8, 1935, when they returned it with eighty-three typed pages of informal objections and criticisms; that counsel for appellants thereupon redrafted said statement of evidence, incorporating therein all suggested changes which they could, without injury to their clients, adopt; that on completion thereof Hon. F. C. Jacobs was in Los Angeles, returned to Phoenix in December, 1935, and immediately became very ill, not returning to his court until shortly before the proposed statement of evidence was lodged; that counsel for the trustee in bankruptcy at all times suggested that lodgment of statement be deferred until endeavor to reach an agreement as to form and contents of statement first be made and, further, that lodgment be postponed until such time as hearing was possible in order to avoid orders postponing hearing, etc.

.....

(Wm. H. MacKay)

Subscribed and sworn to before me this 8th day of May, 1937.

My commission expires: March 17, 1941.

.....

(Lucille Hill) Notary Public

APPENDIX

Rules of Practice of the United States District Court for the District of Arizona (effective February 1, 1930).

RULE 61

Review of Referee's Orders

A petition for the review of an order made by a referee, as provided in General Order 27, must be filed with the referee within 10 days from date of notice of such order, unless, for good cause shown, such time is extended by the referee, and such extension shall not be for more than 20 days. The referee's certificate on such petition for review when filed with the clerk shall be placed upon the regular law and motion calendar, as provided by rule 12 of the rules of practice in this district. Upon transmitting his certificate, notice thereof in writing shall be given forthwith by the referee to the parties concerned or their counsel, either personally or by mail.

RULE 12

Law and Motion Calendar; Statement of Points and Authorities.

Unless otherwise ordered by the court or provided in these rules, every Monday shall be law and motion day, on which will be heard ex parte motions; demurrers and motions to dismiss; pleas, exceptions to pleadings, master's reports, or orders to show cause; motions for judgment on special verdict, agreed statements of facts, or otherwise; motions for new trial, petitions for rehearing, and applications for injunc-

tion; and all other motions or petitions of which notice to the adverse party is required to be given.

Court will convene at 10 o'clock a. m. on law and motion day. All such papers filed on Monday or Tuesday will be placed on the law and motion calendar for hearing on the following Monday; all such papers filed on and after Wednesday of each week will be placed on the law and motion calendar for hearing on the *second* Monday following. Such matters shall be placed upon said calendar in the order of their filing, and all matters when once properly on the law and motion calendar shall retain their relative positions on said calendar from week to week until disposed of, unless the court or judge shall otherwise order.

The filing of any such paper shall be deemed and treated as a request or direction to the clerk to set the same down for hearing upon the law and motion calendar, as above provided, and a setting of the matter down for hearing within the sense of the equity rules; and no other request, direction, or setting down for hearing shall be necessary in any case; but this rule shall be deemed and treated as a general order of the court, applicable to each particular matter, assigning the same for hearing on the law and motion calendar, as above provided.

With every such paper there shall be served and filed a brief or memorandum of points and authorities upon which the movent, demurrant, or party filing such paper will rely; and the adverse party, before the hearing of such matter, shall serve upon the movent, demurrant, or party filing such paper a brief or memorandum of his points and authorities. Failure to serve and file such brief or memorandum, as

herein required, will be penalized in the discretion of the court.

Upon reading any notice of motion and motion with proof of due service thereof and of copies of the papers upon which the motion is made, if no one appears to oppose it, the moving party may be entitled to a decision on the motion. Upon the regular call of the law and motion calendar, when no counsel appears to support a paper or matter thereon, it may be overruled or denied without any examination of the record, unless such counsel shall have filed a brief or memorandum of points and authorities, as herein provided, in which case the court will assume that counsel do not care to orally argue the matter, and the same will be considered as submitted, unless otherwise ordered by the court.